case".[137] Thus, if we adopted this requirement, where a subscriber's complaint failed to conform, instead of dismissing it out of hand, we might send the subscriber an informational letter describing what a complaint should state and permit refiling within a set period (for example, 30 days). The filing of the first complaint would serve to toll the time limit on complaints, which we discuss below. On the other hand, although rigorous technical requirements should not be imposed, this Commission and cable operators need assurance that our procedures permit only genuine allegations of illegal rates to go forward and do not permit complaints that are frivolous or lack any serious substantive allegation to proceed.

100. A second alternative, therefore, is to set an even simpler standard for a subscriber complaint, and to make this a minimum standard which would have to be met in order to avoid dismissal. For example, a subscriber might be required to allege that cable rates have risen unreasonably within a given period and give the specific range of rates and years involved. The complaint would have to allege that the complainant was a subscriber of a cable system named in the complaint, and also state the name of the franchising authority. The simplicity of this second approach would facilitate the filing of subscriber complaints. We observe that if a relatively straightforward benchmark approach is adopted, requiring a subscriber to state facts showing that rates were above the benchmark might be a simple minimum standard that a layman could easily meet. It is also conceivable, however, that use of a minimum standard of sufficiency for complaints might not give a cable operator sufficient notice of the precise claims made and might place greater demands on Commission staff seeking to determine the issues and resolve the dispute. Should a benchmark alternative for rate regulation not be adopted, or should a benchmark not prove workable as a procedural standard, use of some other minimal standard might also not adequately screen frivolous or unsubstantiated complaints. We seek comment on these alternatives for defining the minimum showing required for substantive complaints. We also invite additional suggestions.

101. Interested parties are also asked to comment on specific forms or language that might be standardized for use by subscribers in filing rate-related complaints. We also ask for comment on how such standardized information might be made widely available. For example, should it be given to local franchising authorities for local distribution? We also seek comment on whether complaints filed by franchising authorities or parties represented by counsel could or should be held to a different pleading standard and, if so, what that standard should be.

102. The difficulties that ordinary subscribers may face in drafting complaints may make it advisable to enlist the franchising authorities' expertise in this process. Having a franchising authority provide a statement or decision concerning the alleged violation as part of a subscriber's complaint might facilitate the drafting of the complaint, provide better notice to a cable operator of the allegations, and expedite resolution of the dispute. In cases where a refund is ordered to a class of

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[137] Conference Report at 64.

subscribers,[138] the concurrence of the local franchising authority would help ensure that an individual complaint was truly representative of the class. It might also ensure that our resolution of a cable programming service rate dispute did not undermine the franchising authority's regulation of basic cable service rates. This could otherwise occur, for example, if a different ratemaking methodology were applied to basic and cable programming services. We thus seek comment on whether subscribers should be permitted, or required, to obtain a franchising authority's decision or concurrence as a precondition to the filing of a valid complaint. Parties advocating that such a decision or concurrence be required are asked to reconcile such a requirement with the amendment incorporated in the Cable Act which specifically permits subscribers, as well as franchising authorities and other relevant local and state governmental entities, to file complaints.[139]

103. We propose to require that all complaints be served on both the cable operator and the franchising authority by the complaining parties. After a complaint is served, an operator would have a reasonable period of time in which to file a response, e.g., 15 or 30 days. Based on the complaint and response, we would make a determination of whether a complainant had made a minimum showing to permit the case to go forward. We thus would look to both the complaint and response before deciding whether there was a minimum showing to allow the complainant to proceed. This would appear to be consistent with Congressional intent that a complaint not be required to demonstrate a prima facie case.[140] Once we had determined, based on a review of the two documents, that a minimum showing of a violation of our rules had been established, we would issue an order asking for further information from the operator and setting a further pleading schedule, if necessary. At this point the operator would have the burden of producing evidence to disprove the allegations. This alternative should prove expeditious and easy for non-lawyers to use. As the cable operator is likely to be the party in possession of the data necessary for a resolution of the dispute, placing the burden on the operator once a minimum showing has been made appears reasonable and consistent with the statute. We also observe that if we adopted a benchmark model for regulation, if an operator could simply show that its rates were within the benchmark, it would be able to avoid extensive showings related to costs and other factors that might justify an above-benchmark rate. We seek comment on these tentative conclusions and proposals. In particular, we ask interested parties to comment on what the appropriate pleading cycle should be, taking into account the statute's dual objectives of expedition and fairness.

104. Alternatively, we seek comment on whether we should automatically require that cable operators answer complaints that we have determined are in good faith and raise a genuine substantive issue. Under

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138 See infra para. 108.

139 Communications Act, § 623 (c)(1)(B), 47 U.S.C. § 543 (c)(1)(B); Conference Report at 64.

140 Conference Report at 64.

this approach, a cable operator would not be required to respond automatically to all complaints. Rather, we (or the subscriber) would notify the operator of a complaint after it had been initially reviewed by Commission staff and found to meet our minimum showing.[141] In this connection, we observe that under a benchmark approach, an operator would be required to respond only if the allegations were that rates were outside the benchmark.

105. The Cable Act provides that, with one exception, our procedures for cable programming service complaints shall be available only to those filing within a "reasonable period" after a change in rates, including a change resulting from a tiering change.[142] We tentatively find that a time limit of 30 days from the time that a subscriber received notification of such a rate change would provide adequate opportunity for a subscriber to formulate a complaint under the simplified procedures we contemplate. We seek comment on whether this would be a reasonable period of time within the meaning of the statute. We also ask for comment on whether we should allow an additional 30 days if we require the concurrence of a franchising authority for the filing of a complaint as discussed above. Section 623 (c) (3) excepts from the "reasonable period of time" requirement complaints filed within 180 days following the effective date of our regulations concerning cable programming service rates. Thereafter, subscribers and other interested parties will have become familiar with our new regulations. We thus interpret this exception to permit subscribers to complain of any cable programming service rates within that 180-day period, regardless of when those rates were initially effective. Although we would be able to rollback prospectively any such rates in violation of our rate regulations, we do not believe that we would be able to order refunds for unreasonable rates in effect prior to the effective date of our regulations. After this 180-day period passes, subscribers would be held to the 30-day time limitation. We seek comment on these tentative conclusions.

106. We also seek comment on how to treat information which may be necessary to a decision, but which the cable operator regards as proprietary. Our existing rules authorize the withholding of trade secrets or confidential financial or commercial information from routine disclosure to the public.[143] As a general matter, however, we believe the burden should be firmly on the cable operator involved to demonstrate that significant competitive injury might result from any disclosure of information used in the rate regulation process and that as full a disclosure as is reasonably possible should be mandated. We seek comment on whether our existing rules would be adequate in a cable rate dispute, and whether they are sufficiently flexible to permit an opposing party to have access to the information necessary for its case. In particular, we also ask whether we should devise procedures permitting the parties to a dispute limited access to proprietary information in specific

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141 See supra para 100.

142 Communications Act, Section 623 (c) (3), 47 U.S.C. § 543 (c) (3).

143 47 C.F.R. § 0.457 (d).

cases, and in what cases such limited access would be appropriate. Should we permit an operator to redact confidential information in the first instance, with Commission staff retaining the ability to seek further information if necessary? In such cases, should we confine distribution of such information to designated representatives of parties and Commission staff? We also invite comment on the types of information relevant to a cable rate determination which would likely be considered proprietary by any of the parties involved and, in particular, on any special problems that may arise from use of data proprietary to third parties.

107. Once a decision is made, we seek comment on what types of relief are available. We assume that our authority under the Cable Act to prevent unreasonable rates at a minimum authorizes us to order prospective reductions of rates we have found to be unreasonable. We propose to require operators to make such reductions promptly, for example within 30 days of a Commission decision finding existing rates unreasonable. We seek comment on this tentative conclusion and proposal. In addition, we ask interested parties to comment on whether our ability to order prospective rate reductions would extend to prescription of specific rates.

108. We tentatively find that our authority under Section 623 (c) (2) (C) permits us to reduce rates determined to be unreasonable and to refund to subscribers the portion of such rates found to be unreasonable that subscribers paid after the filing of a complaint. We propose in the first instance to determine the amount of overcharge and to order a refund to the actual subscribers who paid this overage. It may, however, be administratively infeasible or unreasonably burdensome to determine the actual subscribers who paid the unreasonable rate. In such cases, we propose to order a prospective percentage reduction in the unreasonable service rate to cover the cumulative overcharge, and to have that reduction made in the bills sent to the class of subscribers that had been unjustly charged. This reduction would be in addition to the rate reduction necessary to eliminate prospective overcharges, and would end when compensation for the overcharge had been made. We interpret our authority under Section 623(c) as permitting us to reduce rates for the class of subscribers who paid for a service the rate for which was determined to be unreasonable, even if this finding was based upon a complaint filed by a single subscriber. We believe that this construction is necessary to fulfill the purposes of this statutory provision. We seek comment on these tentative findings and proposals.

109. In keeping with Congressional intent, we envision the above-described procedures as operating simply and informally. At the same time we intend to fashion them so as to safeguard the due process rights of all participants.[144] We seek comment on how best to devise procedures that will

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[144] Cf. Northwestern Indiana Telephone Co. v. FCC, 824 F. 2d 1205, 1211 (D.C. Cir. 1987) (in complaint over telco-cable affiliation rules, due process did not require an evidentiary hearing where there was no material issue of fact). But cf. Connecticut Office of Consumer Counsel v. FCC, 915 F. 2d 75, 81 (2d Cir. 1990), cert. denied, 111 S. Ct. 1310 (1991) (upholding decision not to hold hearing on complaint brought pursuant to 47 U.S.C. §

effectuate these objectives. One option would be to treat cable programming service complaints as informal adjudications and apply the streamlined procedures outlined just above. If this option were adopted, would it also be advisable to adopt relaxed (e.g., permit but disclose) ex parte rules to facilitate staff resolution of a dispute in which presumably non-lawyers were participating? Another approach might be to style cable programming services complaints as ratemaking proceedings, using procedures analogous to those followed in our tariff review process.[145] These procedures would be the sole means by which the Cable Act empowers us to regulate cable programming service rates and determine liability for overcharges on a prospective basis only (from the time the complaint was filed). They thus reasonably could be analogized to ratemaking proceedings. Under this option, we would also consider cable programming service proceedings to be non-restricted proceedings under our ex parte rules, subject to "permit but disclose" ex parte obligations.[146] This approach would give Commission staff maximum flexibility to gather relevant information, flexibility particularly helpful in disputes where one or more parties were not represented by counsel. This approach thus also serves our objective of crafting procedures which do not require parties to have professional representation. We seek comment on our proposed complaint procedures and on whether they would adequately accommodate the various policy objectives and legal constraints just articulated. Should it be necessary to establish more formal proceedings in cases involving factual disputes or potential refund liability, we seek comment on how we might accomplish this and still make these proceedings accessible to non-lawyers and to parties located in areas distant from Commission offices in Washington, D.C. We also seek comment on whether alternative dispute resolution would be one possible solution, should the parties agree to employ it.[147]

110. Once relief is ordered, we must ensure that our decision is properly effectuated. We seek comment on whether operators should be required to certify that they have implemented our decision. We tentatively find that noncomplying operators would be subject to forfeitures.[148] We seek comment on this tentative conclusion and on other remedies such as reporting requirements, that may be appropriate in specific circumstances.

5. Provisions Applicable to Cable Service Generally

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145 See, e.g., 47 C.F.R. Part 61.

146 47 C.F.R. § 1.1206.

147 See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission Is a Party, 6 FCC Rcd 5669 (1991) (committing the Commission to the use of ADR techniques to expedite and improve its administrative process whenever feasible and consistent with our statutory mandate).

148 47 U.S.C. § 503(b).

a. Geographically Uniform Rate Structure.

i. Statutory Requirements

111. The Cable Act of 1992 requires cable operators to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."[149]

ii. Discussion

112. In accordance with the above provision of the Cable Act, we propose to incorporate into implementing regulations a provision that cable systems must have a uniform rate structure throughout the geographic area served by the cable system. We solicit comment generally on the extent to which cable operators' ability to establish service categories with separate rates and terms and conditions of service is limited by the requirement for a geographically uniform rate structure. We also seek information on the extent to which cable operators currently enter into special service arrangements with some customers or types of customers, such as long-term service contracts with certain types of customers (educational and medical institutions, large residential communities or buildings) with discounted rates and other special terms and conditions. In addition, we solicit comment on whether cable operators should be afforded the flexibility to establish bona fide service categories with separate rates and service terms and conditions.

113. We tentatively conclude that the statutory requirement of a geographically uniform rate structure does not prohibit establishment of reasonable categories of service with separate rates and terms and conditions of service. We tentatively conclude that the requirement for a uniform rate structure should be read in conjunction with the amendments to Section 623(e), which authorize regulatory authorities to prohibit discrimination, but do not require that they do so. We do not interpret the statutory mandate for uniform rate structures as precluding reasonable discriminations in rate levels among different categories of customers provided that the rate structure containing such discriminations is uniform throughout a cable system's geographic service area. Such categories of customers with different rate levels might include, for example, those specifically identified in Section 623(e) -- senior citizens or other economically disadvantaged groups. We reach this conclusion notwithstanding some language in the legislative history suggesting that rates should be uniform throughout the geographic service area.[150] We solicit comment on

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149 Communications Act § 623(d), 47 U.S.C. § 543(d).

150 Senate Report at 76. The Conference Report says that § 3(d) of the Cable Act was taken directly from the Senate version of the bill. Conference Report at 65. It also would not prohibit promotional rates or differences among rates charged seasonal and full-year customers per se. The

this conclusion.

114. We seek comment on the meaning of the term "geographic area" as used in this section of the Act. One possible interpretation is that Congress intended this phrase to mean a franchise area. Lending support to this interpretation, the legislative history indicates that Congress was concerned about cable operators having different rates within a franchise area.[151] We recognize, however, that many cable systems provide service for more than one franchise area. If Congress intended to limit the meaning of geographic area to a franchise area, it could have used the less ambiguous term. In addition, if the meaning of geographic area is limited to a franchise area, Section 623(d) of the Communications Act would be duplicative of Section 623(e); different rate structures within a franchise area could be prevented by antidiscrimination rules.

115. If the Commission assumes that geographic area refers to an area greater than a franchise, the Act appears to limit the region to the contiguous area served by the cable system. Under this more inclusive interpretation, we would require a uniform rate structure throughout a cable system. This might cause problems under a cost-of-service alternative for regulating cable services because different franchises within a system could have differing costs. For example, costs may vary due to differing franchise fees, density of homes passed, the age of facilities, or many other factors. We request comment on whether Congress intended to require or to permit cross-subsidization to maintain uniform rates within a cable system. We solicit comment on the advantages and disadvantages generally of interpreting geographic area as synonymous with franchise area or as referring to a greater area. We solicit comment on our discretion to adopt these different interpretations.

b. Discrimination.

i. Statutory Requirements

116. The Cable Act permits local and federal authorities to prohibit discrimination in provision of cable service, except that (1) cable operators may establish reasonable discounts for senior citizens or other economically disadvantaged groups,[152] and (2) local and federal authorities may regulate installation or rental of equipment for the hearing impaired.[153]

ii. Discussion

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reasonableness of such rates would, however, still turn on operators' compliance with the substantive ratemaking standards we ultimately adopt.

151 Senate Report at 76.

152 Communications Act, § 623(e)(1), 47 U.S.C. § 543(e)(1).

153 Communications Act, § 623(e)(2), 47 U.S.C. § 543(e)(2).

117. Based on this provision, we tentatively conclude that we should explicitly permit the discounts contemplated in the statute. Local authorities would also be free to adopt anti-discrimination provisions consistent with the statute and our implementing regulations. We seek comment on these tentative conclusions. We seek comment in particular on whether differences in rates among different classes of customers based on differences in costs of providing services should not be prohibited under this provision. We also seek comment on what economically disadvantaged groups other than senior citizens may be awarded reasonable discounts by cable operators. The Act does not preclude authorities from adopting regulations concerning equipment and installation which facilitate reception by the hearing impaired that are consistent with other provisions of the Cable Act. We seek comment on whether there is any need at this time to adopt specific rules at the federal level as well.

c. Negative Option Billing.

i. Statutory Requirements

118. The Cable Act provides that an operator may not charge a subscriber for "any service or equipment that the subscriber has not affirmatively requested by name." The Act further provides that a subscriber's failure to refuse a proposal to provide such service or equipment "shall not be deemed to be an affirmative request for such service or equipment."[154] The legislative history indicates that Congress did not intend this Section to apply to "changes in the mix of programming services that are included in various tiers of cable service."[155]

ii. Discussion

119. We interpret this provision to mean that, in order to be billed for any cable service (either tiers or individually priced programs or channels) or equipment, a subscriber previously must have affirmatively requested that particular service or equipment. A cable operator may not take a subscriber's inaction following the operator's proposal to provide such service or equipment as an affirmative request for the same. We tentatively conclude that an affirmative request for service or equipment may occur orally or in writing so that subscribers are given flexibility to order by either method. We also tentatively conclude that an operator should not be permitted to charge for any service or equipment provided in violation of Section 623(f) of the Act and our implementing rules.[156] We seek comment on this tentative conclusion. It would appear that under such a regime,

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154 Communications Act, § 623(f), 47 U.S.C. § 543(f).

155 Conference Report at 65.

156 See generally 39 U.S.C. § 3009 (b) (stating that unordered merchandise may be treated as a gift by the recipient); N.Y.Gen.Bus.L. § 396(2a) (McKinney Supp. 1992) (deeming unsolicited goods, wares or merchandise an unconditional gift to the recipient).

subscribers that had been charged in violation of our rules would simply not pay the illegal charge, with the onus on the cable operator to attempt to collect through the local judicial process. We thus seek comment on whether disputes between the operator and subscriber arising under this provision would primarily be subject to resolution in the local courts. This remedy would be in addition to the forfeiture provisions applicable to the operator that fails to comply with Section 623 (f) and our implementing rules.[157] We remain concerned, however, that our enforcement procedures be adequate to correct any practices or patterns on the part of operators that violate our rules, and seek comment on how we can ensure our ability to do so.

120. The legislative history states that Section 623(f) does not apply to "changes in the mix of programming services that are included in various tiers of cable service."[158] We seek comment on the types of tier changes that may be made without violating the negative option billing restriction and whether such tier changes must be revenue neutral. Can they involve additions or deletions of services? We tentatively find that a change in the composition of a tier that was accompanied by a price increase justified under our rate regulations would not be subject to the negative option billing prohibition. We believe that this interpretation will avoid an undesirable stalemate in system offerings that could disserve subscribers overall. We also do not believe that Congress intended the negative option billing provision to apply to system-wide upgrades in equipment accompanied by a justified price increase. Otherwise the provision might discourage operators from making beneficial system improvements. We seek comment on these tentative conclusions. However, we also seek comment on whether subscribers should be given notice of such changes. Should we require, for example, that an operator notify subscribers at least 30 days in advance of a change in a system's offering, such as an addition to a tier or an equipment upgrade, accompanied by a price increase? We also seek comment on the interplay between the negative option billing provision and the prohibition on evasions set forth in Section 623(h).[159]

121. We also seek comment on how this provision should apply to initial implementation of the basic cable service rate structure. For example, an operator may have been offering a basic service consisting of more channels than are now required under the Cable Act's definition of basic service. It may now effectively be required to split its former basic service into the Act's formulation of basic service and an expanded basic tier. If some subscribers do not affirmatively request both basic and expanded basic, we seek comment on whether the operator may nevertheless continue to bill them at the old rate. What if the operator has also changed the rates?

d. Collection of Information.

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157 47 U.S.C. § 503(b)(2) and (6)(B).

158 Conference Report at 65.

159 Communications Act, § 623 (h), 47 U.S.C. § 543 (h).

i. Statutory Requirements

122. The statute requires cable operators to file annually with the Commission or franchising authorities, as appropriate, beginning one year from the date of enactment, such financial information as is necessary to administer and enforce rate regulation.[160]

ii. Discussion

123. In this NPRM we have proposed several alternatives for implementation of Section 623 of the Communications Act as amended by the Cable Act of 1992. The information that regulators will need to assure that they can effectively administer and enforce the requirements of Section 623 will be determined by the alternative that we ultimately adopt. In order to assure that we can adopt a collection of information requirement that will permit effective administration and enforcement of Section 623, we are proposing to collect on an annual basis the information specified in Appendix C and the information collected by the Commission in the Order, MM Docket No. 92-266, FCC 92-545, adopted December 10, 1992. We will also need to collect information concerning rates of systems subject, and not subject, to effective competition to enable us to publish the annual reports on average prices required by section 623(k).[161] This information may be more comprehensive than is necessary to implement some of the alternatives proposed in this NPRM. We intend to tailor the collection of information to the method of implementing Section 623 that we ultimately adopt; less information than that specified in Appendix C may be ultimately required, in any event.

124. We solicit comment generally on the appropriate scope of information that we should collect pursuant to Section 623(k). We solicit comment on the availability of the information specified in Appendix C, on whether cable systems will ordinarily have developed this information, and the burdens that the collection of this information would impose. To the extent this information is not already developed by cable systems, we solicit comment on the extent to which we should require that they develop it, and on time periods that we should permit for its development. We solicit comment on whether we should require the information specified in Appendix C to be submitted by every cable system. Alternatively, we seek comment on whether we should rely instead on a sampling of systems, and, if so, what sampling methodology we should use. While this latter approach could ease administrative burdens, but may not achieve the same degree of accuracy as a more broadly imposed reporting requirement would. We also solicit comment on whether, in order to reduce burdens on systems with 1000 or fewer subscribers, we should require less information, or no information, from such systems.

e. Prevention of Evasions.

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160 Communications Act, Section 623(g), 47 U.S.C. Section 643(g).

161 See paras. 138-39, infra.

i. Statutory Requirements

125. The Cable Act requires us to promulgate regulations that will prevent evasion of its rate regulation provisions and, specifically, evasions resulting from retiering.[162] The statute requires that we periodically review these regulations.[163]

ii. Discussion

126. We propose generally to prohibit evasion of our rate regulations by cable operators. We propose to allow interested parties to avail themselves of the expedited procedures we establish for rate relief to seek redress of evasions of our rate regulations. We plan to periodically review the standards we establish pursuant to this subsection, with the first review occurring two years from the rules' effective date, and with periodic reviews every three years thereafter. We seek comment on these proposals.

127. As the legislative history contemplates, we propose to prohibit an unjustified increase in rates to subscribers for cable service resulting from retiering that "shift[s] cable programs out of the basic service tier into other packages."[164] At the same time, the Cable Act of 1992 permits, and indeed appears to require in some cases, a restructuring of service offerings.[165] We invite comment on how specifically we can prohibit unjustified rate increases that through retiering might otherwise evade our rate regulation regime. Retiering necessary to comply with basic tier requirements, retiering that did not change the ultimate price for the same mix of channels in issue to the subscriber, or retiering accompanied by a price change that complied with our rate regulations would not be deemed an evasion. We seek comment on this proposal. It is also possible that our substantive rate regulations will lessen the potential for evasions through retiering as well. Should we adopt a parallel rate regulation regime for both the basic tier and cable programming services, this uniformity of approach might eliminate the incentive for operators to move services from basic to cable programming services tiers in order to evade rate regulation. We seek comment on the interplay between our substantive rate regulation responsibility and our obligation to adopt rules preventing evasions.[166] We

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162 Communications Act, § 623(h), 47 U.S.C. § 543(h).

163 Id.

164 Conference Report at 65.

165 See, e.g., Communications Act, Section 623(a)(7)(A),(B), 47 U.S.C. Section 543(a)(7)(A), (B).

166 The legislative history specifically states that we must adopt regulations to prevent evasions of the "anti-buy-through" provisions of the Cable Act. Conference Report at 65; Communications Act, § 623(b)(8), 47 U.S.C. § 543(b)(8). These provisions are the subject of a separate

also seek comment on whether we need to establish specific rules regarding evasions of rate regulation through charges for changes in equipment, particularly in light of the specific rules we are adopting regarding such charges.[167] Finally, we seek comment on other specific evasive acts and practices that should be prohibited. For example, we seek comment on whether retiering and repricing of cable services between the effective date of the Act and the implementation of these regulations could, if found to be unreasonable or evasive, raise specific concerns under our proposed enforcement scheme.

f. Small System Burdens.

i. Statutory Requirements

128. The Cable Act requires that we develop and prescribe cable rate regulations that reduce the administrative burdens and cost of compliance for cable systems that have 1000 or fewer subscribers.[168]

ii. Discussion

129. We seek comment on how best to effectuate this statutory requirement. Our current rules exempt operators of cable systems of fewer than 1000 subscribers from certain administrative requirements.[169]@ We similarly could exempt cable systems of fewer than 1000 subscribers from certain administrative burdens associated with the rate regulations we establish. Depending on the substantive ratemaking standard adopted, we might, for example, exempt small systems from certain accounting requirements or the obligation to submit certain data. With respect to the data collection requirements of the Act,[170] we might rely on external sources of data or, if necessary, special studies instead of requiring individual reports from small systems. We seek comment on this general proposal, as well as on the specific requirements from which small systems might appropriately be exempted. Parties are also invited to comment on other alternatives, e.g., the filing of abbreviated reports or other streamlining of administrative obligations that also might be appropriate. We also seek comment on ways we might coordinate any administrative requirements with the actual operations of small cable systems, e.g., coordinating reporting with

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proceeding and we will consider how to prevent their evasion in that proceeding.

167 See supra paras. 62-71.

168 Communications Act, § 623(i), 47 U.S.C. § 543(i).

169 See, e.g., 47 C.F.R. § 76.300 (b) (exempting small systems from maintaining a public inspection file containing records required to be kept regarding political rules, sponsorship identification, EEO performance, and commercial limits in children's programming, signal leakage logs, and repair records).

170 See supra paras. 122-24.

systems' billing cycles or internal budgetary processes.

130. We also seek comment on whether we should exempt small systems from any substantive or procedural rate regulation requirements and, if so, which ones. Our current rules exempt small systems from network non-duplication protection requirements,[171] syndicated exclusivity rules,[172] and from certain technical standards and performance testing requirements.[173] A community unit having fewer than 1000 subscribers currently is exempt from the sports broadcast blackout rule.[174] Are there requirements in our proposed rate regulation regime from which small systems may also appropriately be exempt?

131. In this regard we also seek comment on whether we should establish a presumption that systems with under 1000 subscribers are, because of the underlying costs involved and the small base over which these costs can be spread, unlikely to be earning returns or charging rates that could effectively be altered to the benefit of subscribers through detailed regulatory oversight. There is evidence that small systems tend to have higher costs and to charge lower rates.[175] Under such an approach, a small cable system might be deemed to be in compliance with our rate regulations until it was affirmatively demonstrated -- by a franchising authority in the case of basic service rates or by a subscriber or other interested party in the case of cable programming service rates -- that a small system's rates were unreasonably high. A second option might be to permit small companies to certify their compliance with our rate regulations. A third option might be to tailor our rate regulations specifically to small companies. We might, for example, devise basic cable rate regulations that assure that high-cost small systems will be able to fully recover their costs. We seek comment on these substantive approaches to alleviating regulatory burdens on small systems and on whether they harmonize with the general objectives of the

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171 47 C.F.R. 76.95(a).

172 47 C.F.R. § 76.156(b).

173 47 C.F.R. § 76.601(e) (exempting systems with under 1000 subscribers which do not use frequency spectrum other than that allocated to over-the-air television and FM broadcasting from testing requirements). See also Cable Television Technical and Operational Requirements, 7 FCC Rcd 2021 (1992).

174 47 C.F.R. § 76.67 (f). A community unit, as stated supra note 36, is a cable system, or portion thereof, operating within a separate and distinct community or municipal entity.

175 Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, Appendix F, Tables 2F and 2H (1990) (average rates of 1-1,000 subscriber system as of 12/31/89 $14.46, compared to $16.75 for systems with over 50,000 subscribers, while average cost per channel to the operator was 90 cents for a 1-1,000 subscriber system and 45 cents for a 50,000-plus subscriber system).

Cable Act.

132. In addition, we tentatively conclude that we should exempt small systems from certain procedural requirements, including, for example, the filing of rate schedules. We seek comment on this tentative conclusion. We might also modify requirements such as burden of proof or information production for small systems in contested cases. We seek comment on such procedural approaches to alleviating regulatory burdens on small systems.

133. Finally, in making some or all of these small system exceptions, should we distinguish between independently owned stand-alone systems of under 1000 subscribers and systems of under 1000 subscribers which are owned by a large MSO? Although the plain language of the statute makes no such distinction, we question whether systems in the latter case need such regulatory protection. A small cable system affiliated with an MSO may enjoy advantages such as program discounts or access to corporate resources that stand-alone small systems do not, and thus may not need the protection Section 623(i) offers. It might also be appropriate to distinguish between larger and smaller MSOs if we distinguished between MSO and independently owned systems. For example, we might distinguish a system directly or indirectly owned by a cable operator that directly or indirectly owns other cable systems, which altogether serve some specific number of subscribers.[176] Parties advocating such an option are encouraged to suggest specific subscriber numbers that might serve to distinguish large from small MSOs. With the exception of the sports blackout rule, the size of a cable system is determined under our current rules according to the number of subscribers served by a single integrated headend.[177] In contrast, the community unit measurement used in the sports blackout rule defines a system in a narrower manner, according to what is essentially the cable franchise area.[178] Use of the single integrated headend might help ensure that what is in practice a large system fully capable of meeting our requirements does not qualify merely because it covers numerous franchise areas, each under 1,000 subscribers. We seek comment on whether either of these two definitions might be appropriately applied in the context of rate regulation of small cable systems. We also ask interested parties to suggest any alternative definitions they believe would be appropriate under the Cable Act. Finally, we seek comment on whether a system's qualifying for small system treatment should be based upon the average number of subscribers over a period of years, rather than the number of subscribers as of a specific date. The former standard would avoid abrupt or frequent changes in regulatory status

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[176] We would propose using our existing attribution rules to determine ownership. Cf. Implementation of Sections 11 and 13 of the Cable Television Consumer Protection Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations, MM Docket 92-264 (adopted Dec. 10, 1992) (discussion of using current attribution rules for determining horizontal ownership).

[177] See 47 C.F.R. § 76.5(a).

[178] See 47 C.F.R. § 76.5(dd).

resulting from seasonal or other brief fluctuations in the subscriber base.

g. Grandfathering of rate agreements.

i. Statutory Requirements

134. The Cable Act provides that the statute and its implementing regulations do not supersede franchising agreements made before July 1, 1990 that authorize regulation of basic cable service rates if there was not effective competition as of that date.[179] The provision states that such agreements are to remain in effect "during the term" of such agreements.

ii. Discussion

135. We tentatively conclude that this provision authorizes a franchising authority with a franchise agreement executed before July 1, 1990, that was regulating basic cable rates at that time to continue regulating basic cable rates for the remaining term of that agreement without certification from this Commission. We tentatively conclude that such franchising authorities (who are not required to apply for certification) should nevertheless be required to notify this Commission that they intend to continue to regulate basic cable rates under the provisions of Section 623(j). This notification will give the Commission information we need to compile the annual reports on average prices required under the Cable Act.[180] We seek comment on these tentative conclusions. We also seek comment on whether an agreement that falls within the terms of Section 623(j) would supersede Commission regulations governing the rates for cable programming services that are not part of the basic tier as defined in the agreement and thus not subject to regulation under the agreement. We also seek comment on how franchising authorities now regulating rates and not covered by the grandfathering provision just discussed should make the transition to rate regulation under our new rules.

h. Reports on Average Prices.

i. Statutory Requirements

136. The statute requires the Commission to publish annual statistical reports comparing charges for the basic tier, cable programming services, and equipment offered by cable systems subject to effective competition, with those charges made by systems not subject to effective competition.[181]

ii. Proposals

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[179] Communications Act, § 623(j), 47 U.S.C. § 543(j).

[180] Communications Act, § 623(k), 47 U.S.C. § 543(k).

[181] Communications Act, Section 623(k), 47 U.S.C. Section 543(k).

137. In order to comply with these requirements, we will need to collect certain cable system data. These data include rates charged for basic cable service, expanded basic service, and other cable programming; and fees for converter boxes, remote control units, program guides, installation and disconnection charges, and any other charges for equipment or service. Because we may wish to compare systems of similar sizes or other characteristics, we propose also to collect information on system size (measured by number of subscribers), system channel capacity, and possibly other characteristics such as percent of distribution plant above or below ground, length of distribution plant, and subscriber density per mile. We envision that the annual statistical report will consist of a compilation of the above data elements.

138. There are a number of possible ways to collect the specific data. Trade publications such as the Cable Fact Book collect much of the data we require, but such data are collected on a voluntary basis and are not always complete for each individual cable system. It appears to be necessary, therefore, to require cable operators to submit certain information directly to us on a regular basis. Such information obtained directly from cable operators would be reliable, complete and comparable. We request comment on the specific data to be collected. For example, should the data submitted be on a per system rather than a per franchise basis? Further, we note that the data we propose to collect for the annual report on rates may duplicate in part the data needed to carry out the ongoing rate regulation provisions of the Cable Act. These rate regulation responsibilities will likely require that we obtain rate and service data as described above. In addition, depending on the particular rate standard we ultimately adopt, we may also need data on various costs and other financial information. We tentatively conclude that we should combine all data requirements on a single form and request comment on that conclusion.

139. We realize that annual collection of data will be costly for both the industry and the Commission. One option for minimizing these costs would be to collect data from a sample of cable systems rather than from the industry as a whole. We propose to obtain information from a simple random sample of cable systems or, alternatively, from all the largest companies as well as from a sample of the smaller cable firms. The information would be reliable and comparable but not necessarily as complete as a survey of the entire industry. For example, since so few cable systems now face effective competition, a simple random sample of the industry may not yield reliable measures of rates for those systems. Hence, we might need to do a full survey of all systems facing effective competition. We seek comment on this issue. We also seek comment on how to identify systems subject to effective competition. Finally, commenters are invited to suggest other ways we may obtain the data needed to fulfill the annual reporting requirements specified in Section 623 (k).

i. Definitions

i. Statutory Requirements

140. The statute includes definitions of effective competition,

cable programming service, and multichannel video programming distributor which we have already set forth.[182]

ii. Discussion

141. In order to implement the statutory definitions and rules to incorporate these terms, we propose to adopt the definitions without change. We solicit comment on this proposal. We additionally solicit comment on whether we should establish any additional definitions in our rules.

j. Effective Date

i. Statutory Requirements

142. The statute provides that the amendments to Section 623 establishing rate regulation of cable systems not subject to effective competition shall be effective 180 days from the date of enactment. The statute gives the Commission authority to prescribe regulations effective on the date of enactment. The statute expressly requires the Commission to establish regulations concerning rates for the basic service tier, rates for cable programming service, and prevention of evasions within 180 days of enactment.[183]

ii. Discussion

143. In order to assure that we meet the statutory deadline for implementing regulations, we propose to adopt implementing rules prior by April 3, 1993 and to make them effective as rapidly thereafter as is reasonably feasible. We seek comment on this proposal and on what if any interim requirements may be necessary as the rules come into force. We have tentatively concluded that, while our regulations must be in place 180 days from the date of enactment, the statute does not require that all implementing steps that cable systems must take to meet the obligations of the statute or our rules must be completed on that date.

D. Leased Commercial Access

1. Statutory Requirements

144. The 1984 Cable Act required cable operators to designate a percentage of their channel capacity for commercial use by unaffiliated persons, with the exact percentage varying depending on the system's total

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182 See Communications Act §623(l)(1)-(2), 47 U.S.C. §543(l)(1)-(2).

183 Communications Act, Sections 623(b)(2),(c)(1),(h); 47 U.S.C. Sections 543(b)(2), (c)(1), (h).

channel capacity.[184] The purpose of the leased access section of the 1984 Act was to assure diversity of information sources to the public in a manner "consistent with growth and development of cable systems."[185] Congress recognized that cable operators might not have the incentive to offer such diversity, if a particular programmer's offering represented a viewpoint conflicting with the operator's or competed with a program service the operator already provided.[186] At the same time, however, the terms of a leased access arrangement were not to adversely affect the operation, financial condition, or market development of the system.[187] It was the operator's editorial control, not his economic power, which was of concern to the Congress at this point in time. While the price, terms and conditions for leased access were subject to a standard of reasonableness, the operator's terms were presumed reasonable unless the unaffiliated programmer could make a clear and convincing demonstration that this was not the case.[188] Congress specifically contemplated permitting an operator to establish discriminatory rates, terms and conditions.[189] It also provided that any court reviewing a leased access dispute should not consider the price, terms or conditions established between an operator and affiliate for comparable service.[190]

145. As stated above, Section 612 of the Communications Act states that its purpose is to assure that the widest possible diversity of

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184 Communications Act, 47 U.S.C. § 612 (b)(1), 47 U.S.C. § 532 (b)(1) (36-to-54 channel system to designate ten percent of channels not otherwise required for use by federal law or regulation; 55-to-100 channel system to designate 15 percent of channels not otherwise required for use by federal law or regulation; over-100 channel system to designate 15 percent of all channels).

185 Communications Act, § 612 (a), 47 U.S.C. § 532 (a).

186 House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong. 2nd Sess. 48 (1984) (1984 House Report).

187 Communications Act, § 612 (c)(1), 47 U.S.C. § 532 (c)(1); 1984 House Report at 50.

188 Communications Act, § 612 (f), 47 U.S.C. § 532 (f); 1984 House Report at 50-51.

189 Congress stated that otherwise an operator might be forced to charge an average price lower than the fair market price for some services, but higher than the fair price for others. Congress stated that this might make it impossible for services offered by non-profit entities to obtain access. It noted that prices for premium services should probably be higher than for a news or public affairs service, and that both would be priced very differently from an educational or instructional service. 1984 House Report at 51.

190 Communication Act, § 612 (d), 47 U.S.C. § 532 (d).

information sources is made available to the public from cable systems in a manner consistent with growth and development of cable systems. The amendments to Section 612 of the Communications Act contained in the Cable Act of 1992 add an additional purpose to the section: to promote competition in the delivery of diverse sources of video programming.[191] Other amendments to Section 612 grant the Commission authority: to determine the maximum allowable rates that a cable operator may establish for leased commercial access, including the rate charged for billing and collection services; to establish reasonable terms and conditions for commercial use of the system, including those to govern billing and collection; and to establish procedures for expedited resolution of disputes concerning rates or carriage.[192] The Commission is required within 180 days of enactment to adopt regulations exercising authority in these areas.

2. Discussion

a. Maximum Reasonable Rates

146. The language of Section 612, as amended by the Cable Act of 1992, that governs leased commercial access does not limit its application to only cable systems not subject to effective competition as the Act defines that term.[193] Accordingly, we tentatively conclude that our regulations governing the maximum reasonable rate for leased commercial access will apply to all cable systems. We also tentatively conclude that the Cable Act of 1992 does not necessarily require cable operators to provide billing and collection services. Rather, we believe that Congress intended only that we establish regulations governing the maximum rate for such services if an operator chooses to offer them. We also tentatively conclude that we should require that any charges for billing and collection services that a cable operator may elect to provide be unbundled from other charges for leased commercial access. We solicit comment on these tentative conclusions.

147. We have initially identified three alternative standards for determining maximum reasonable rates for leased commercial access and for billing and collection services: reliance on benchmark rates based on costs of typical cable systems, reliance on the cost-of-service principles we have described previously at paras. ___, supra, and reliance on the marketplace where effective competition exists. A fourth possibility, not explored in detail herein but on which comments are solicited, would be for the Commission to establish a mechanism or formula under which subscriber rates for the basic service tier and/or cable programming services could be used to compute a rate for leased commercial access. We solicit comment on

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191 Communications Act, Section 612(a), 47 U.S.C. Section 532(a).

192 Communications Act, Section 612(c)(4)(A), 47 U.S.C. Section 532(c)(4)(A).

193 In order to faciliate our review of issues concerning leased commercial access, we are directing commenters to address in a separate section of comments issues concerning leased commercial access.

mechanisms for formulas that could be used for this purpose.[194] Additionally, we seek comment on whether we should establish additional rate ceilings to govern rates for not-for-profit programmers.

148. Benchmark Based on Typical System Costs. Under this alternative, rates for leased commercial access would be governed by a benchmark based on costs incurred by a typical or ideal cable system for constructing and operating channel capacity. Such a benchmark would be particularly useful for cable systems whose rates for basic tier service and cable programming service were not subject to individual system cost-based regulation, possibly because they also met a benchmark. We solicit comment on the use of such a benchmark for regulating commercial access rates. We also seek comment on whether there are bases other than costs for setting a benchmark that we might use to establish maximum rates reasonable to both lessees and system operators.

149. Cost-of-Service. Under this alternative, the maximum reasonable rates for leased commercial access and for billing and collection services would be designed to recover the costs of providing those services. The advantage of this alternative is that it permits cable operators to recover costs of providing leased commercial access, but also promotes the statutory goal of assuring the widest possible diversity of information sources because rates would be based on costs. In addition, efficiencies that the cable operators can capture by virtue of their holding local franchises are passed on to the programmers.

150. Under this alternative, we would require that the maximum reasonable rate would be based on all direct costs, an allocation of the joint and common costs of access and of providing other cable services, an allocation of general and administrative overheads, and a reasonable profit determined under cost-of-service regulatory principles that we have already discussed. Should we select the cost-of-service alternative, we solicit comment on whether we should require a fully distributed cost methodology to identify the joint and common costs to be recovered through rates for leased channel access or for billing and collection services.

151. The Cable Act of 1992 left unchanged the language of Section 623(c)(1) stating that the price, terms and conditions under which leased access occurs should be at least sufficient to assure that such use would not "adversely affect the operation, financial condition, or market development of the system." We ask for comment on whether a strictly cost-of-service method of setting maximum reasonable rates would be consistent with congressional concern that leased access not harm the financial condition of cable systems. We also seek comment on how demand for leased access should be factored into setting rates, particularly for less than full time use of the access channel, should we select a cost-of-service approach for

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[194] Comment is also requested on the manner and extent to which costs incurred in prohibiting or blocking indecent programming in accordance with the provisions of Section 10 of the Cable Act of 1992 should be factored into any of the above approaches.

determining the maximum reasonable rate for leased commercial access.

152. Marketplace Rates. Under this alternative, we would determine that where a competitive market exists for leased commercial access or for billing and collection services there would be no prescribed price or ratemaking methodology, i.e., the cable operator would be able to charge the market price for leased commercial access and billing and collection services. The advantage of this approach is that it would eliminate the costs of regulation, while providing an expectation grounded in established economic theory that prices will remain reasonable and be driven to costs where competition exists.[195] We solicit comment on this approach generally and, in particular, on whether it is consistent with congressional intent and whether the Cable Act of 1992 authorizes us to rely on market forces to set such maximum rates. We also solicit comment on the extent to which a competitive market for leased commercial access currently exists. The Commission has already determined that a competitive market exists for billing and collection services justifying the detariffing of such services provided by telephone companies.[196] We solicit comment on whether the billing and collection services that were considered by the Commission in connection with telephone companies are the same as, or relevant to determining proper treatment of, the billing and collection services that cable systems might offer in connection with leased commercial access. We also ask whether the previous finding of the Commission concerning telephone companies' billing and collection services warrants adoption of a marketplace approach for determining the maximum reasonable rate for billing and collection services offered by cable operators.

153. Special Rates for Not-for-Profit Programmers. The legislative history of the Cable Communications Policy Act of 1984 indicates that Congress may have contemplated that cable operators be permitted to establish separate rate ceilings for different categories of programers taking commercial leased access.[197] We seek comment on whether the Cable

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195 Stigler, The Theory of Price, 4th ed. at 178-192 (1987).

196 Detariffing of Billing and Collection Services, CC Docket No. 85-88, Report and Order, 102 FCC 2d 1150 (1986), recon. denied 1 FCC Rcd 445 (1986).

197 "...[N]othing in these provisions is intended to impose on a cable operator the requirement that he make available on a non-discriminatory basis, channel capacity set aside for commercial use by unaffiliated persons. [N]on-discriminatory access requirements could well undermine diversity goals ... [B]y establishing one rate for all leased access users, a price might be set which would render it impossible for certain classes of cable services, such as those offered by not-for-profit entities, to have any reasonable access to a cable system. ... A premium movie service will obviously warrant a very different and, in all probability, a higher price than a news or public affairs service, and both of these would pose a different pricing situation from an educational or instructional services." Report on HR 4103, Report 98-934 at p. 51.

Act of 1992 empowers us to set a lower maximum rate for leased commercial access for not-for-profit programmers, and ask whether this could help assure the diversity of programming sources on cable systems sought by the drafters of Section 612. We ask to what extent we can permit costs of providing leased commercial access to not-for-profit programmers to be recovered from other leased access customers or from cable subscribers on all tiers generally. We also solicit comment on the impact on operators and subscribers of requiring that leased access be provided at special rates to such programmers. We solicit comment generally on the need for special rates for not-for-profit programmers.[198]

154. In addition to the above proposals, we solicit comment on whether we need to take any measures to assure that our regulations governing maximum resale rates for leased commercial access are fulfilling the statutory objectives of Section 612. We solicit comment on relying on the complaint process to monitor the effectiveness of our regulations. Alternatively, or in addition to the complaint process, we could establish a reporting requirement that will enable us to track the use of leased commercial access and rates charged for that use. Specifically, we could require cable operators to provide on an annual basis the following information: set-aside capacity required, percentage of set aside capacity used, percentage of set- aside capacity used by not-for-profit programmers, and prices charged for leased access. We solicit comment on this alternative, and, should we adopt it, ask whether we should exempt small systems from compliance with some or all of these reporting requirements.

b. Reasonable Terms and Conditions of Use

i. Statutory Requirements

155. Section 612 (c)(4)(A)(ii) requires the Commission to "establish reasonable terms and conditions"[199] for commercial use of leased access cable channels.[200]

ii. Discussion

156. In enacting Section 612 (c)(4)(A)(ii) in 1992, Congress apparently was particularly concerned that leased access programmers be

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198 Should we establish special provisions for not-for-profit programmers, we propose to make these provisions applicable to entities that are tax exempt because of their not-for-profit status as defined by the Internal Revenue Service. §501(c)(3). We solicit comments on this proposal.

199 Communications Act, §612(c)(4)(A)(ii), 47 U.S.C. §532(c)(4)(A)(ii).

200 See supra paras. 146-54 addressing terms and conditions for billing and collection.

offered a "genuine outlet" for their product.[201] Thus, we seek comment on whether we need to address in our rules tier location, channel position, and time scheduling for leased access use. Such regulation might bring more uniformity to the terms and conditions governing leased access use. It also could increase certainty in the leased access market and thus, increase usage of leased access channels, consistent with Congressional intent.[202] We seek comment on this alternative and on what factors we should take into account if we adopted it, e.g., channel capacity of the system, number of channels required to be designated for leased access use, or nature of the leased access material. We also seek comment on how such an alternative could be fashioned so that it intruded minimally upon programming decisions negotiated by private parties and on the discretion of the cable operator with respect to channel positioning and configuration of its system. Balancing Congress' concern that leased access channels provide a genuine outlet for programmers with the fact that the Cable Act of 1992 leaves intact the general prohibition on the cable operator's exercising editorial control over leased access, we seek comment on what the appropriate scope of the operator's discretion regarding tiering and channel location for leased access should be.[203]

157. We tentatively conclude that we should establish guidelines for technical standards and conditions for leased access. We propose to require that operators apply the same technical standards they apply to programs to be carried on public, educational, and governmental access channels to leased access programs. Thus, an operator could not reject for technical reasons a program for leased access airing if it would not reject the program for the same reasons for airing on public, educational or governmental access channels. We seek comment on this proposal. We also seek comment on what, if any, technical and production facilities the cable operator should be expected to offer leased access users. For example, should the operator be required to provide only minimal technical support, e.g., the playing of a tape, or should more advanced equipment and support be made available? Presumably the leased access programmer would be required to pay for the technical support it used. Would we base the necessary level of technical support on the size of the cable system, the capabilities of the programmer, or both? Should a satellite programmer desire leased access, would an operator be required to provide satellite receive facilities?

158. If a programmer receives access to a commercial leased channel without prepayment in full for such access, we ask when the operator should be able to require posting of a bond or deposit. We also seek comment on the impact of any bond or deposit requirement on programmers' ability to secure access to leased channels.

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201 Senate Report at 79.

202 Senate Report at 31-32.

203 Under § 10 of the Act, a cable operator is not precluded from exercising editorial control over indecent speech. Communications Act, § 612 (c)(2), 47 U.S.C. § 532 (c)(2).

159. While the Communications Act does not give cable operators editorial control over leased access programming,[204] the Cable Act does permit operators to prohibit or to channel indecent material on leased access channels.[205] We are presently considering how to implement these provisions of the Act.[206] Thus, we propose generally to prohibit a cable operator from setting terms or conditions for leased access use based on content, with the exception that an operator "may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person."[207] We also propose to except from this prohibition on influencing content those terms and conditions relating to indecent material that would be consistent with the Cable Act and the implementing regulations we ultimately adopt. We seek comment on this approach.

160. Existing Section 612 (c)(1) provides that an operator shall establish prices, terms and conditions for leased access to an unaffiliated user at least sufficient to ensure that such use "not adversely affect the operation, financial condition, or market development of the cable system."[208] We seek comment on how to ensure that regulations we establish for leased access terms and conditions are consistent with this provision and do not undermine the financial condition of the cable system, while at the same time harmonizing with the statutory provisions governing the maximum rate for leased access. The legislative history of the 1984 Act indicates that Congress contemplated different treatment of leased access providers, who by definition are unaffiliated with the operator,[209] and of affiliated entities who may also lease a channel or have an equivalent arrangement.[210] It is unclear whether in passing the 1992 Cable Act, and requiring us to establish reasonable terms and conditions for leased access use, Congress intended to reinforce or reduce such differentiation. We thus seek comment on whether we have the authority to and, if so, whether we should require

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204 Communications Act, § 612 (c)(2), 47 U.S.C. § 532 (c)(2).

205 Communications Act, § 612 (h), (j), 47 U.S.C. § 532 (h),(j).

206 See Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, Indecent Programming and Other Types of Materials on Cable Access Channels, Notice of Proposed Rulemaking, MM Docket No. 92-258, FCC 92-498 (released Nov.10, 1992).

207 Communications Act, § 612 (c)(3), 47 U.S.C. § 532 (c)(3).

208 Communications Act, § 612 (c)(1), 47 U.S.C. § 532 (c)(1).

209 Communications Act, § 612 (b)(1), 47 U.S.C. § 532 (b)(1) (a cable operator shall designate channel capacity for commercial use by persons "unaffiliated" with the operator).

210 1984 House Report at 53. See also Communications Act, § 612 (d), 47 U.S.C. 532 (d).

operators to apply the same terms and conditions to the leasing of channel capacity by both affiliated and nonaffiliated users. If so, would this requirement extend to services such as billing and collection? We also seek comment on how our regulations might permit the beneficial discrimination which Congress considered might be necessary to establish terms and conditions that might be needed, for example, by non-profit program suppliers.[211]

161. We also seek comment on whether there is any need to reconcile the amendments made by the Cable Act of 1992 with the existing statute and its underlying objective of promoting diversity. For example, one may speculate that if rates for leased access are low enough, unaffiliated programmers may seek to move their program offerings from other channels to those set aside for leased access, thereby diminishing the number of channels available for leased access without adding to the diversity of programming offered on the system. We seek comment on the probability of such migration occurring, the likely impact of such actions, and whether there is any need to take regulatory action at this time to prevent it.

c. Procedures for Expedited Resolution of Disputes

i. Statutory Requirements

162. The Cable Act requires that we establish procedures "for the expedited resolution of disputes concerning rates or carriage" of leased access.[212]

ii. Discussion

163. The legislative history of Section 612(c)(4)(A) indicates that Congress believed that existing provisions of the Cable Act of 1984 entitling aggrieved leased access users to bring action in federal district court or to file complaints at the Commission were too cumbersome. Congress believed these provisions, together with the imposition of a high burden of proof on access users, may have led to limited demand for leased access.[213]

164. One means of fulfilling Congressional intent to increase use of leased access channels would be to streamline this Commission's dispute resolution procedures for aggrieved leased access users. Thus, we propose to permit an aggrieved access user to file a petition for relief alleging that an operator's rates or terms and conditions for use of leased access capacity violate our rules. The petition could consist of a short and plain statement of the facts constituting the violation and the specific rule or regulation allegedly violated. We would require service of the petition on

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211 See supra para. 153.

212 Communications Act, §612(c)(4)(A)(iii), 47 U.S.C. § 532(c)(4)(A)(iii).

213 House Report at 39-40.